LANDSCAPING BY
FEMIA ASSOCIATES, INC.

VABCA-5099

CONTRACT NO. V815P-3038

VA MEDICAL CENTER
NORTHPORT, NEW YORK

Sal Femia, President, Landscaping By Femia Associates, Inc.**,** Dix Hills, New York, for the Appellant.

Jeanne A. Anderson, Esq., Trial Attorney; ***Philip S. Kauffman, Esq***., Trial Attorney; and ***Phillipa L. Anderson, Esq*.,** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ANDERS
(Pursuant to Board Rule 11)

Landscaping by Femia Associates, Inc. (Femia or Contractor) has filed a timely appeal from a final decision of the Contracting Officer at the Department of Veterans Affairs (VA) Medical Center, Northport, New York, which denied Femia's claim for an equitable adjustment in the amount of $28,905. The claim arises under a negotiated service contract for the mowing of grass at the Long Island National Cemetery. The parties have waived their rights to a hearing and have elected to submit their case on the record pursuant to Board Rule 11.

The record consists of the pleadings, Appeal File (R4, tabs 1-20), and briefs from both parties.

We decide only entitlement.

FINDINGS OF FACT

On February 18, 1994, the Department of Veterans Affairs (VA) Medical Center, Northport, New York, issued Request for Proposal (RFP) 632-13-94 for a contract to provide all labor, tools, equipment, supplies and materials necessary to mow all grass within the boundaries (including areas outside the fence line) of the Long Island National Cemetery. The area encompassed approximately 300 turfed acres. The solicitation stated at section 52.216-1 that the "Government contemplates award of a firm fixed-price contract resulting from this solicitation." (R4, tab 3)

The base period of the solicitation was from April 1, 1994, to November 30, 1994, with four option years. In Section B of the RFP the Government noted in the "quantity" column "estimated 23" indicating the number of mowings it anticipated. The RFP required bidders to enter the unit price for the estimated 23 mowings and total the yearly amount in the amount column. (R4, tab 3)

Section C, Statement of Work, Paragraph 4 reads as follows (R4, Tab 3):

4. SPECIFICATIONS

> a. For contracting purposes all turf areas will be mowed a *minimum* of twenty-three (23) times, beginning with 2 cuts in April and at least 3 cuts a month from May through November 1994 with an additional 5 cuts (for holidays or other special occasions) as called for by the COTR [Contracting Officer's Technical Representative] or his designated representative.
>
> (emphasis added)
>
> b. The frequency of mowing may increase or decrease due to heavy rain seasons, drought, special events or other factors as may be determined by the COTR.
>
> c. All turf areas must be mowed within 6 inches of headstone, markers monuments, tree trunks, or other obstacles. Mowing height will be approximately 3-3 ½ inches to avoid scalping turf.
>
> d. Areas not to be mowed or excluded [from] mowing cycle(s) will be designated by the Contracting Officer or COTR.
>
> * * * * *
>
> i. The Assistant Director of Internments and Maintenance is designated as the COTR

VA received ten proposals in response to the RFP. Appellant was the low offeror. Its proposal was based on a unit price of 23 mowings and proposed a price per mowing as follows: base year, $5,480; Option Year 1, $5,781; Option Year 2, $6,100; Option Year 3, $6,436; Option Year 4, $6,790. On April 6, 1994, the VA accepted the proposal from Femia for an estimated total value of $703,501 (base period plus 4 option years) which was the sum of the above bid prices times 23 mowings per year. As previously mentioned, the base period was the period April 1, 1994 through November 30, 1994. The option periods were as follows:

Option Year 1: April 1, 1995 through November 30, 1995.
Option Year 2: April 1, 1996 through November 30, 1996.
Option Year 3: April 1, 1997 through November 30, 1997.
Option Year 4: April 1, 1998 through November 30, 1998.

(R4, tab 6)

The contract also allowed VA to order at its discretion, 5 additional mowings at the quoted unit price. On December 14, 1994, VA exercised its option for Option Year 1.

Because the contract crossed Fiscal Years, initial funding was provided for the period April 1, 1995 through September 30, 1995, for 16 mowings at a cost of $92,496 (R4, tab 8).

On July 24, 1995, Lynwood Johnson, the Cemetery Caretaker Foreman, sent a memorandum to Selah Scott, Contract Specialist, advising that because of drought conditions the grass was not growing as it had been, and that constant mowing "could effect our turf." Mr. Johnson recommended the contract be modified to a payment by acreage rather than per mowing. He attaches a Memorandum for the Record dated July 20, 1995, signed by Dennis Gura (no title). Mr. Gura states that he told Mr. Femia that he had spoken with Contracting Officer Scott "and the minimum number of mowings is not a concern especially at this time." (R4, tab 9) The drought continued, and, on August 24, 1995, Mr. Johnson again wrote Contract Specialist Scott requesting the mowing operations be suspended. On that same date Amendment/Modification No. 1 was issued suspending the mowing operations until further notice stating: "Due to drought conditions, mowing services [are] being suspended. You are ordered to cease mowing at 4:30, 8-24-95. When conditions change you will be called back to continue mowing." (R4, tab 11) On September 15, 1995, Amendment/Modification No. 2 was issued. It reduced the number of cuts from 16 to 14 for the period April 1, 1995 through September 30, 1995, at the rate of $5,781 per mowing (a reduction from $92,496 to $80,934). There is no reference to an equitable adjustment to the contract price. (R4, tab 12)

By letter dated October 1, 1995, enclosing a Purchase Order dated September 25, 1995, the contract was renewed for the period October 1, 1995 through November 30, 1995, calling for 6 mowings at a total cost of $34,686.

(R4, tab 13)

Appellant alleges it completed 90% of the sixth mowing when snow fell, ending the mowing season. (R4, tab 19)

On February 19, 1996, Appellant wrote to the CO requesting an equitable adjustment based on its contract interpretation that 23 mowings were required and summarized its claim as follows:

> A summary of work completed under this portion of the contract is detailed as follows:
>
> | | |
> |---|---|
> | Cuts [completed] and paid | 18 |
> | Cuts completed and not paid | 1 |
> | Cuts not completed at the direction of director on 8/24/95 with work 50% completed and not paid | 1 |
> | Cuts not completed at the direction | |

of director on 11/28/95, because of snow storm with work 90% completed and not paid	1
Cuts not performed pursuant to direction of the Director	2
Total minimum cuts per contract	23
Cuts paid	18
Cuts unpaid and due	5
Billing per cut	$5,781.00
Amount due	$28,905.00

(R4, tab 14)

On April 17, 1996, CO Scott issued a final decision and in denying the claim stated that " I do not agree that there is no conflict or inconsistencies. An estimate is not the same as a 'minimum of 23'. The statement, 'The frequency of mowing may increase or decrease due . . . is not the same as a 'minimum of 23'. It is clear that these items both conflict and are inconsistent." This appeal is from that decision. (R4, tab 19) The Appellant reduced the amount of its claim in its Notice of Appeal by $2,201 to $26,803 after receiving a partial payment for the August 24, 1995 mowing. Contracting Officer Scott's affidavit states that the amount in controversy is $18,381.65 because the contractor has been paid $5,781 for the full cut; $2,201.05 or 38% of the unit price for the partial cut in August and $2,640 for the partial cut in November which is 45.66% of the unit price. Although it does not say so, by paying the lesser amounts, we assume the VA is disagreeing with the Appellant' position that the August cut was 50% complete and the November cut was 90% complete. Neither party submitted any evidence concerning their calculation of how much had been mowed. (R4, tab 19)

DISCUSSION

Appellant asserts that there is no conflict in the terms of the contract. Femia argues that the contract requires a minimum of 23 mowings. It says that the frequency language refers to how often and when the 23 mowings would occur, not the total number of mowings. Conversely, the Government asserts that there is only one reasonable interpretation of the Contract, *i.e.*, that the quantity of 23 mowings was an estimate and not a guaranteed minimum, and that, accepting Femia's interpretation would render the Contract patently ambiguous and place Femia under a duty to inquire about the type and scope of this negotiated contract. The Government further asserts that Femia's interpretation renders meaningless contract provisions concerning the estimated number of mowings, and allowing VA to reduce the frequency of mowings; that the meaning of Specification Paragraph 4a, allegedly setting forth a guaranteed minimum of 23 mows, is clarified by Specification Paragraph 4b, which states that "the frequency of mowing may increase or decrease due to heavy rain seasons, drought, special events or other factors as may be determined by the COTR." The Government says Paragraph 4a itself, relied upon

by Appellant as establishing a guaranteed minimum of 23 mowings, contains limiting language providing that the mowings will occur only "as called for by the COTR or his designated representative." It is the Government's position that the contract calls for an estimated 23 mowings, subject to increase or decrease due to weather and other factors. The Government states that it anticipated the weather impact on mowing requirements that occurred here by including Specification Paragraph 4b, allowing the Government to increase or decrease the frequency of mowings. The Government cites well-recognized authorities on contract interpretation but does not point specifically to cases dealing with negotiated contracts with ambiguities concerning material elements of the contract.

In the alternative the VA says the directions not to mow should be considered constructive terminations for convenience limiting the contractor's recovery to termination costs only.

The Government does not enlighten us as to the type of contract it thinks we have before us. We understand why the Government wanted a contract for an estimated 23 mowings that could simply be adjusted up or down but other than saying it is ambiguous, the VA does not point to any provision that would make this a requirements contract or allow them to order any number of mowings it deems appropriate. We assume that the VA does not believe this contract can be deemed a requirements contract because it did not cite us to ***C & S Park Service, Inc***., ENG BCA Nos. 3624, 3625, 78-1 BCA ¶ 13,134, which held that a contractor was not entitled to reimbursement for a reduction in grass mowing services ordered under a requirements contract because summer drought conditions obviated the need for mowing. The ENG BCA stated that the Government's liability under a requirements contract is limited to its actual requirements and it is under no obligation to order or pay for any services which it does not need. ***D. M. Summers, Inc***., VABCA No. 2750, 89-3 BCA ¶ 22,123.

The contract in this appeal is not a requirements contract. This contract is a negotiated firm fixed price contract for the stated minimum quantity of 23 mowings. The VA's interpretation would amount to nothing more than a "wish, want or will" contract, unenforceable in government contracting. In ***Updike, Trustee v. United States,*** 69 Ct. Cl. 394, 401 (1930), in defining a "wish, want, or will" contract, the court said:

> A wish, want, or will contract is not enforceable because of lack of mutuality. If the contract merely binds one party to furnish whatever the other party may desire with respect to certain articles, one is bound and the other is not, and no enforceable contract results.

The Government's position is grounded in Specification Paragraph 4b. If properly used, the frequency of mowing language could have referred to the number of mowings. As used here, however, that language refers to the "2 cuts in April and at least 3 cuts a month from May through November" language in Paragraph 4a. The frequency language would allow 1 mowing one month and 5 the next or any combination thereof, if desired by the Government. The frequency of the mowings does not change the fixed minimum number of mowings for which the parties contracted.

We do not agree with the VA's argument that the "as called for by the COTR"

language in Paragraph 4a refers to the 23 cuts. That language only modifies the VA's right to order up to 5 additional cuts. We find nothing in the contract language that prevents the contract from being the firm fixed-price